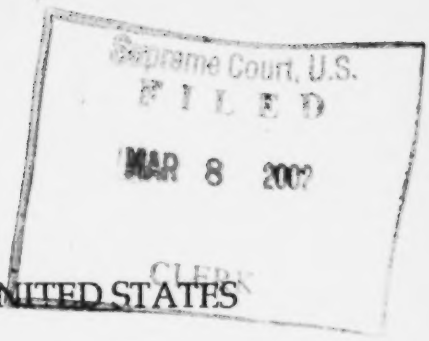

(2)

No. 01-1221

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH W. OLMSTEAD,

Petitioner,

v.

WALTER INDUSTRIES, INC.,
dba Mid State Homes, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

Brief filed by:
Joseph W. Olmstead, *pro se*
208 West Osborne Avenue
Tampa, Florida 33603-2020
Telephone: (813) 238-8015
Facsimile: (813) 231-0924

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LIST OF PARTIES TO THE ACTION

Joseph W. Olmstead, *pro se*, Petitioner

Walter Industries, Inc., Respondent

Mid State Homes, Inc., Subsidiary of Walter Industries, Inc., Respondent

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Robinson v. Shell Oil Co., 117 S.Ct. 843, 847 (1997), page 9.

INDEX OF APPENDICES

Appendix A - Notice of the United States Equal Employment Opportunity Commission of Right-to-Sue (Conciliation Failure), issued February 20, 2002.

Appendix B - Letter of Determination of the United States Equal Employment Opportunity Commission, issued November 28, 2001.

MAY IT PLEASE THE COURT to permit Joseph W. Olmstead, proceeding *pro se* ("petitioner"), to file this supplemental brief, which has been prepared in good faith and in accordance with Supreme Court Rule 15.8.

On February 19, 2002, petitioner filed 40 copies of a petition for a writ of certiorari ("petition") pursuant to Supreme Court Rule 33.1 with the fee and proof of service. Pursuant to information and forms furnished by the Clerk, the case was placed on the docket on February 25, 2002.

On February 20, 2002, one day after the petition was filed, the United States Equal Employment Opportunity Commission ("EEOC") issued a "right-to-sue notice (conciliation failure)" with respect to matters set forth in the EEOC's Letter of Determination and pending issues in this case between the parties; and those documents are included as Appendices A & B.

Petitioner is mindful that Rule 15.8 limits the content of a supplemental brief, as the Rule states:

> "8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form

for a brief in opposition prescribed by this Rule....".

As the petition filed on February 19, 2002 contained argument with respect to the questions presented for review, petitioner certifies that this brief has been prepared in accordance with the text and spirit of Rule 15.8 and Rules regarding form and service. Petitioner also certifies that this supplemental brief is submitted in good faith and is not being filed for delay or any other purpose.

Petitioner certifies that prior to filing this brief, in addition to serving within one business day the forms issued by the Clerk, which pursuant to Rule 12.3 are required to be furnished to Walter Industries, Inc. ("respondent"), on that same date, March 4, 2002, I conferred with respondent's counsel in regard to this brief; and respondent is opposed to supplementation.

For the reasons set forth in this brief and the affect of doctrines, including those of the "law of the case" and *res judicata*, petitioner respectfully argues that supplementation is appropriate.

One of the requests for relief sought in the District Court and Court of Appeals pertains to the issue of requesting consideration for *vacant* positions in accordance with respondent's usual and customary practices and procedures with respect to former employees and group plan participants.

On February 22, 2001, the District Court ordered that respondent is not obligated to re-hire petitioner. The District Court directed that petitioner could re-apply[1]; and pursuant to the instructions of the District Court, in addition to diligently requesting forms and other materials from the respondent (prior to and subsequent to the District Court's Order), as well as diligent follow-up efforts noted in an affidavit filed in support of a motion for stay, which was granted by the Court of Appeals, petitioner had sought consideration for eleven[2] (11) vacant positions for which I am qualified by training and experience.

As the respondent advised through counsel on the morning of February 15, 2002 of the respondent's position that re-hire will not occur, petitioner advised respondent that I will refrain from seeking consideration for vacancies.

Petitioner is mindful that it is an extraordinary request to seek this Court's review of the findings

---

[1] On forms prepared by respondent of record, there is indication that petitioner is eligible for re-hire.

[2] There have been more than eleven vacancies, however, petitioner has only applied for positions for which I am qualified; and those positions are: (1) Senior Mortgage Assistant; (2) Telemarketing Assistant; (3) Collections Clerk; (4) Senior Title Clerk; (5) Commissions Clerk; (6) Foreclosure Clerk; (7) Investigative Clerk for Human Resources; (8) Inside Collections Representative; (9) Title Clerk; (10) Lead Agent; and (11) Telemarketing Qualifier.

of an administrative agency at this stage of the litigation. The findings of the EEOC were issued *after* the Court of Appeals had issued the Decision and after a petition for rehearing was denied. As the District Court ordered that petitioner is entitled to no relief, petitioner prays this Court will consider the findings of the EEOC, allow the respondent time to brief the issue, and permit relief or proceedings as appropriate and just.

The Appendixes to this brief could not have been filed or brought to the attention of any Court below. On October 24, 2001, the Court of Appeals issued a Decision; and on November 28, 2001, the Court of Appeals denied a petition for rehearing. On that same date, November 28, 2001, the EEOC issued and mailed a Letter of Determination, which stated in pertinent part:

"Letter of Determination

> On behalf of the Commission I issue the following determination on the merits of this charge.
>
> Respondent is an employer within the meaning of Title I of the Americans with Disabilities Act (ADA) of 1990, as amended. Timeliness, deferral and all other requirements have been met.
>
> Charging Party alleged that since January 11, 2001, he has been denied hire because of his disability and in retaliation for filing a

previous charge of employment discrimination against the Respondent.

Examination of the evidence indicates that Charging Party is a qualified person with a disability, who has been denied hire by the Respondent. The evidence shows that Respondent chose to disregard medical opinion, and concluded that Charging Party is totally disabled. The evidence further indicates that Respondent retaliated against the Charging Party for filing a previous charge of discrimination. I have determined that the evidence obtained during the investigation establishes that there is a reasonable cause to believe that a violation of the ADA occurred.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practice by informal methods of conciliation. ....".

See Appendix B - Letter of Determination of the U.S. EEOC, dated November 28, 2001 and permitted to be disclosed after February 20, 2002 upon issuance by the Commission of a right-to-sue notice (conciliation failure).

In accordance with the confidentiality provisions of the conciliation process, which was set to begin within ten (10) days of November 28,

2001[3], petitioner has intentionally omitted such and certifies that the Commission advised on February 14, 2002 of the respondent's position submitted on or about February 13, 2002; and on February 15, 2002, the conciliation process concluded. As the respondent made clear on Friday morning, February 15, 2002 of its position regarding no re-employment now or at a future date, and as there was no resolution of the remaining issues set forth in the petition, it would appear reasonable and in the interests of finality, precious judicial resources and justice, for

---

[3] Petitioner certifies that in addition to agreeing on December 5, 2001 to fully cooperate to amicably resolve in good faith some or all of the issues between the parties, including the issue pertaining to requesting consideration for *vacant* positions, I had followed up with respondent through its counsel via telephone messages on December 21, 2001 and December 28, 2001; and no response was received. In addition, on January 22, 2002 and in follow-up to good faith efforts of prior dates, including but not limited to October 23, 2001 and November 29, 2001, I followed up respondent's agent at Heritage Consultants, Inc. ("Heritage"), who had advised on November 1, 2001, that Heritage had been awaiting information from Walter Industries, Inc.; and a copy of the correspondence was furnished to respondent. On January 28, 2002, Heritage advised as follows: "This letter is to acknowledge receipt of your January 22, 2002 correspondence. I am carbon copying Walter Industries and attaching a copy of your letter, as this is where any further correspondence should be sent. Thank you for your attention to this matter."

petitioner to respectfully request consideration of the materials of the EEOC during consideration of the petition for a writ of certiorari.

With respect to this brief, in the October 24, 2001 Decision of the Court of Appeals, the Decision stated, in pertinent part that "Olmstead has proffered no evidence that he is a "qualified individual" who is capable of returning to work with or without reasonable accommodation."

Petitioner pressed the issue below, including during proceedings in the District Court before dismissal on February 26, 2001 by submission on January 16, 2001 of an affidavit dated January 16, 2001 with physician's letter dated January 11, 2001 (R-4-123, pages 8-9 and Exhibit E), as well as in proceedings in the Court of Appeals, including on page 13, paragraph 28 of the initial brief, which referenced an affidavit filed on January 16, 2001 (R-4-123), which stated, in part:

> "... 26. As agreed, on January 11, 2001, I submitted a return-to-work letter from my physician and sent same to Heritage and Counsel by telefax and mail. See Exhibit E attached hereto....
>
> 27. I have advised the Company, Counsel and Heritage that I am able to return to work, qualified for a computer/clerical position and that my return will **not** pose any risk to any employees, as I do *not* have any

opportunistic infections or any other conditions which would put anyone at risk. I am aware and understand concerns of co-workers in working with a person who has HIV Disease and can assure all concerned that I am willing to do anything reasonably necessary to allay any fears; and there is no risk to anyone, as the work performed is office/computer work."

On pages 15-16 of the Brief of Appellant ("C. Statement of Facts (Relevant to this Appeal)) filed on May 8, 2001, petitioner stated:

"...5. On October 20, 2000, Employee's physician, a licensed medical doctor and specialist in the treatment of HIV Disease and infectious diseases, ordered comprehensive laboratory tests to determine the most optimum treatment plan; and Plaintiff's medications were changed to less pills and different dosing; and such has resulted in less side effects."

6. On December 18, 2000, Employee sought the forms and procedures to return to active employment in *any* available vacant position for which Employee is qualified by training and experience.

7. As the above forms were not received and as Employer's Agent advised that

> Employee must apply for and be accepted for a position, Employee contacted Employer directly on or about January 2, 2001, as instructed by Counsel on December 29, 2000. On January 11, 2001, Employee submitted physician's letter authorizing return to work."

The relief sought by petitioner, a former employee, is in accordance with other Decisions of this Court, including *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 847 (1997), which stated in part:

> "..For example, 706(g)(1) and 717(b) both authorize affirmative remedial action (by a court or EEOC, respectively) "which may include .... reinstatement or hiring of employees."

In this case, respondent's agents and employees, including representatives of the Human Resources Department and other managers and executives are and were aware of the facts of this matter. The delays and decision(s) to refuse to *consider* petitioner for *vacant* positions continued after petitioner satisfied all requirements in good faith and certified on page 20 of the initial brief filed May 8, 2001 in the Court of Appeals that:

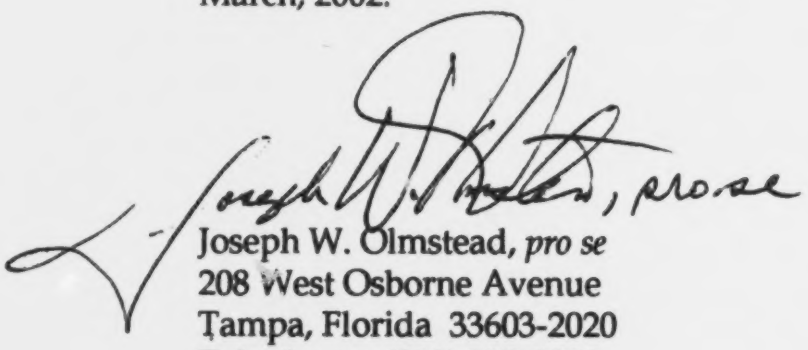
> "2. Employee is aware that in some instances, such as in other labor actions, that is unfeasible for an employee to return to a company's employ. Employee

argues that although the parties have been involved in litigation...; and although Employee has exercised rights with good faith belief that some relief is justified, Employee does not have any ill-will towards Employer or any employees."

CONCLUSION

Petitioner prays this Court consider this supplemental brief (with the determinations of the EEOC shown in the appendices) together with the petition for a writ of certiorari and grant the petition or grant other relief as appropriate.

RESPECTFULLY SUBMITTED this 8th day of March, 2002.



Joseph W. Olmstead, *pro se*
208 West Osborne Avenue
Tampa, Florida 33603-2020
Telephone: (813) 238-8015
Facsimile: (813) 231-0924
Petitioner

APPENDIX A

EEOC Form 161-A (10/96)

U.S. Equal Employment Opportunity Commission

NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To:

Mr. Joseph W. Olmstead
208 W. Osborne Avenue
Tampa, Florida 33603-2020

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

[ ] On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7 (a)

Charge No.	151A11617
EEOC Representative	M. Melendez, Investigator
Telephone No.	(813) 238-2310

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of

the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in Compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

– NOTICE OF SUIT RIGHTS –
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the Respondents(s) named in the charge. **Your suit must be filed WITHIN 90 DAYS from your receipt of this Notice.** Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 Years for willful violations) of the alleged EPA underpayment. This means that **backpay due for**

any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

On behalf of the Commission

s/ Manuel Zurita — 2/20/02
Manuel Zurita, Area Director — (Date Mailed)

Enclosure
Copy of Charge

cc:

Walter Industries, Inc.
c/o Mark A. Hanley, Esquire
P.O. Box 3333
Tampa, Florida 33601

APPENDIX B

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Tampa Area Office

501 East Polk Street, Room 1020
Tampa, FL 33602
(813) 238-2310
TTY (813) 228-2003
FAX (813) 228-2841

EEOC Charge No: 151-A10-1617

Mr. Joseph W. Olmstead
208 West Osborne Avenue
Tampa, FL 33603

Charging Party

Walter Industries, Inc.
1500 North Dale Mabry Highway
Tampa, Florida 33607

Respondent

Letter of Determination

On behalf of the Commission I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title I of the Americans with Disabilities Act (ADA) of 1990, as amended. Timeliness, deferral and all other requirements for coverage have

been met.

Charging Party alleged that since January 11, 2001, he has been denied hire because of his disability and in retaliation for filing a previous charge of employment discrimination against the Respondent.

Examination of the evidence indicates that Charging Party is a qualified person with a disability, who has been denied hire by the Respondent. The evidence shows that Respondent chose to disregard medical opinion, and concluded that Charging Party is totally disabled. The evidence further indicates that Respondent retaliated against the Charging Party for filing a previous charge of discrimination. I have determined that the evidence obtained during the investigation establishes that there is reasonable cause to believe that a violation of the ADA occurred.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of Section 107 of the ADA and Commission Regulations apply to information obtained during conciliation.

If the respondent declines to discuss settlement or when, for any other reason, a settlement

acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. An invitation to Conciliate is enclosed and should be returned to Commission representative, Maria Melendez, within 10 days after receipt. If no response is received within this time period, it will be interpreted as an unwillingness on the part of the Respondent to participate in conciliation efforts. At that time, conciliation efforts will cease.

You are reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission investigations is also prohibited, These protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission:

11/28/01
Date

s/ Manuel Zurita
Manuel Zurita
Area Director

cc: Mark A. Hanley, Esquire
Glen, Rasmussen, Fogarty & Hooper, P.A.
P.O. Box 3333
Tampa, Florida 33601